Appendix A

District Court Judgment

In the United States District Court
For the Northern District of California
Civil No. C-77-0998 SW

United States of America
Plaintiff,

vs.

15.65 Acres of Land in the County of Marin, State of California; Marin Ridgeland Company, a joint venture comprised of O.D.C. of California, Inc., a corporation; and J. H. Scheuer, a.k.a. James H. Scheuer; Housing Authority of the County of Marin; Redevelopment Agency of the County of Marin; and County of Marin; and Unknown Owners,
Defendants.

[Filed Dec. 5, 1980]

FINAL JUDGMENT

The above-entitled action came on regularly for trial on July 28, 1980, before the above-entitled court, the Honorable Spencer Williams presiding, and before a jury regularly impaneled and sworn, for the determination of just compensation to be paid for the estates and interests taken and condemned by the plaintiff in the hearinafter described property.

Paul E. Locke, Assistant United States Attorney, appeared for plaintiff, and Burton J. Goldstein, Esq., of Goldstein, Barceloux & Goldstein, and Jess S. Jackson, Esq., appeared for defendants Marin Ridgeland Company, a joint venture comprised of O.D.C. of California, Inc., a corporation; and J. H. Scheuer, a.k.a. James H. Scheuer.

No other persons appeared in court on said date to claim an interest in or to the land condemned.

After hearing the evidence, both oral and documentary, the arguments of counsel, and upon being full instructed by the Court, the jury retired to consider their verdict and on August 8, 1980, returned the following special verdict:

Interrogatory	Unanimous Answer of the Jury
(1) What was the fair market value in cash, of the larger parcel of property owned by defendant (approximately 164.03 acres) on March 5, 1979, immediately *before* the taking by the Government?	$4,592,840.00
(2) What was the fair market value in cash of the property taken (approximately 15.65 acres) on March 5, 1979?	$ 438,200.00
(3) What was the fair market value in cash, of the remainder (the portion of the larger parcel that was not taken approximately 148.38 acres) on March 5, 1979, immediately *before* the taking by the Government?	$4,154,640.00
(4) What was the fair market value, in cash, of the remainder immediately *after* the taking by the Government on March 5, 1979?	$3,531,444.00
(5) What was the diminution in value of the remainder as a result of the taking by the Government on March 5, 1979 if any? (answer to (3) minus answer to (4)) (sometimes referred to as severance damages)	$ 623,196.00

August 8, 1980.

/s/ EDWARD CUTRIGHT
Foreperson of the Jury

Predicated upon the pleadings, and documents on file in this action, the evidence introduced at trial, motions and the verdict of the jury, the Court is now fully informed and finds as follows:

I.

That the Complaint was filed in this action on May 12, 1977, to condemn a certain interest in Tract 07-101 as more particularly described in said Complaint and as hereinbelow more particularly set forth.

II.

That the use for which the property herein concerned is taken and condemned by the plaintiff is one authorized by law and the said property and the taking thereof are necessary and suited to said use.

III.

That all parties interested directly or indirectly in the property subject of this Final Judgment have been personally served with process or have appeared in said action; that said property, together with all claimants and parties interested therein is within the jurisdiction of this Court, which has the power and authority to enter this Final Judgment.

IV.

That at the time of and immediately preceding the filing of the Complaint and as of the date of the commencement of trial, defendants Marin Ridgeland Company, a joint venture comprised of O.D.C. of California, Inc., a corporation; and J. H. Scheuer, a.k.a. James H. Scheuer, were and are the owners of the fee simple title to Tract 07-101 and the only persons, firms or corporations entitled to receive the compensation to be awarded for the taking of said tract.

V.

That the estate and interest which plaintiff seeks to take and condemn in and to Tract 07-101, described more fully in Schedule "B" attached hereto, is as follows:

Fee simple title, including all and singular the water rights and other rights, tenements, hereditaments and appurtenances thereunto belonging and in anywise appertaining and also all appurtenant interest in any alleys, roads, streets, ways, strips or gores abutting or adjoining said land and in any means of ingress or egress appurtenant thereto; subject to existing easements for public roads and highways, public utilities and pipelines; and further subject to the following:

1. Easement affecting the premises:
   For: Line of poles
   Granted to: Radio Corporation of America
   Recorded: April 14, 1933
   Book: 262 of Official Records at page 39
   Affects: A portion

2. Easement for telephone and poles of the RCA Communications, Inc., easement, 6 feet wide, for high pressure gas line of Pacific Gas and Electric Company; and bank slope easement of the State of California referred to in the Judgment had on August 28, 1942 in an action entitled "United States of America vs. Sausalito Land and Ferry Co., et al" a certified copy of which was recorded in Book 434 of Official Records at page 347.

3. The fact that the ownership of this property has no right of access to the adjoining State Freeway, such rights having been relinquished by the Deed to the State of California recorded May 19, 1955 in Book 943 of Official Records at page 98.

4. Easement for existing roads and utilities.

5. Easement, 20 feet wide, affecting the premises:
   For: Pipeline/pipelines

Granted to: Pacific Gas and Electric Company
Recorded: March 29, 1965
Book: 1924 of Official Records at page 197
Affects: A strip running generally Northwesterly and Southeasterly thru the premises

VI.

That the jury, as aforesaid, has determined that the fair market value of the 15.65 acres of land to be acquired in this action as described in the Complaint is FOUR HUNDRED THIRTY-EIGHT THOUSAND, TWO HUNDRED AND NO/100 DOLLARS ($438,200.00) and that the diminution in value (sometimes referred to as severance damages) of the remaining 148.38 acres is SIX HUNDRED TWENTY-THREE THOUSAND, ONE HUNDRED NINETY-SIX AND NO/100 DOLLARS ($623,196.00) and that the Court finds that the sum of said amounts being ONE MILLION, SIXTY-ONE THOUSAND, THREE HUNDRED NINETY-SIX AND NO/100 DOLLARS ($1,061,396.00) shall be the full, adequate and just compensation for the estate and interest condemned in the above-entitled action in Tract 07-101, and any and all damages resulting from the taking.

VII.

That Tract 07-101, subject of this judgment, in and to which the above-referred to estate and interest is to be taken and condemned, is situate in the County of Marin, State of California, and is more particularly described in Schedule "B", attached hereto and by reference incorporated herein and made a part hereof.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that for the taking of Tract 07-101, which is described in Schedule "B", attached hereto, the sum of

ONE MILLION, SIXTY-ONE THOUSAND, THREE HUNDRED NINETY-SIX AND NO/100 DOLLARS ($1,061,396.00) be and it is hereby awarded to defendants Marin Ridgeland Company, a joint venture comprised of O.D.C. of California, Inc., a corporation; and J. H. Scheuer, a.k.a. James H. Scheuer, as full and just compensation for the taking of the estate and interest as more particularly set forth in paragraph V. hereof, and for any damages resulting therefrom.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon recordation of this judgment the Lis Pendens herein on file, and recorded in Book 3203, Page 293, Official Records of Marin County, California, on the property is hereby released.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said sum of ONE MILLION, SIXTY-ONE THOUSAND, THREE HUNDRED NINETY-SIX AND NO/100 DOLLARS ($1,061,396.00) shall be subject to all liens, taxes, encumbrances, charges and interest, if any, of whatsoever nature existing in and against the said land and that all such liens, taxes, encumbrances, charges, and interest, if any, shall be payable and deductible from said sum.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sum of ONE MILLION, SIXTY-ONE THOUSAND, THREE HUNDRED NINETY-SIX AND NO/100 DOLLARS ($1,061,396.00), upon deposit by plaintiff into the Registry of the Court, shall be payable to St. Paul Title Company, 1300 Fourth Street, P. O. Box 669, San Rafael, California 94903, said title company to act as agent for defendants, without cost to defendants, which company is authorized to disburse any funds necessary to

discharge any taxes, liens, encumbrances, charges or interests affecting title to said land or to obtain disclaimers, if any, to pay the balance remaining to the order of defendants, Marin Ridgeland Company, a joint venture comprised of O.D.C. of California, Inc., a corporation; and J.H. Scheuer, a.k.a. James H. Scheuer, and to record this judgment in the Official Records of Marin County, California.

IT IS FURTHER ORDERED that title to the estate and interest as set forth in paragraph V. above in and to the property described in Schedule "B", attached hereto, shall vest in the United States of America, free and discharged of all liens and claims of any kind whatsoever, upon the payment and recordation of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon recordation of this judgment, plaintiff shall have the right to possession of said Tract 07-101.

DATED: December 5, 1980

/s/ SPENCER WILLIAMS
United States District Judge

SCHEDULE "B"

GOLDEN GATE NATIONAL RECREATION AREA

TRACT 07-101

DESCRIPTION:

That certain real property situated in the County of Marin, State of California, described as follows:

BEGINNING at the intersection of the northwesterly right of way boundary of U.S. Highway No. 101 with the centerline of Marin Avenue depicted on the "Official Map of the Sausalito Land & Ferry Company" Rack 1 Pull 9,

Marin County California records. The point of intersection is monumented with an iron post, 28 inches long, 2½ inches diameter, set 22 inches in the ground with a brass cap marked: T 1 S, R 6 W, GGNRA Ap. 136 1976. From this point a 6" x 6" concrete right of way marker bears N. 37°02'18" E. 157.134 feet. From this same point a 6" x 6" concrete right of way marker bears S. 37°02'18" W. 132.487 feet. Thence along the centerline of Marin Avenue as resurveyed and monumented by the U.S. Bureau of Land Management in 1976, N. 76°00' W. 41.604 feet; thence N. 76°45' W. 50 feet; thence N. 82°00" W. 50 feet; thence S. 50°00' W. 50 feet; thence S. 37°30' W. 50 feet; thence S. 46°30' W. 50 feet; thence S. 12°00' W. 50 feet; thence S. 32°30' E. 50 feet; thence S. 46°30' E. 50 feet; thence S. 39°15' E. 50 feet; thence S. 38°45' E. 50 feet; thence S. 14°00' E. 50 feet; thence S. 14°00' E. 25 feet; thence S. 29°45' E. 50 feet; thence S. 13°15' E. 50 feet; thence S. 15°00' W. 50 feet; thence S. 33°30' W. 50 feet; thence S. 49°30' W. 50 feet; thence S. 46°30' W. 50 feet; thence S. 58°45' W. 100 feet; thence S. 71°15' W. 50 feet; thence N. 63°00' W. 50 feet; thence N. 46°00' W. 50 feet; thence N. 44°00' W. 50 feet; thence N. 77°00' W. 50 feet; thence S. 54°00' W. 25 feet; thence S. 20°15' W. 25 feet; thence S. 15°00' E. 25 feet; thence S. 51°00' E. 50 feet; thence S. 17°00' E. 50 feet; thence S. 06°45' E. 50 feet; thence S. 11°30' E. 50 feet; thence S. 03°00' E. 50 feet; thence S. 32°00' W. 25 feet; thence S. 61°45' W. 25 feet; thence S. 78°45' W. 50 feet; thence S. 48°30' W. 50 feet; thence S. 37°30' W. 150 feet; thence S. 45°30' W. 50 feet; thence S. 52°30' W. 50 feet; thence S. 69°30' W. 25 feet; thence S. 89°00' W. 25 feet; thence N. 52°45' W. 50 feet; thence N. 54°30' W. 50 feet; thence N. 88°15' W. 50 feet; thence S. 57°00' W. 100 feet to the centerline of Alta Avenue; thence

continuing along the centerline of said Alta Avenue as resurveyed and monumented by U.S. Bureau of Land Management 1976 S. 78°00′ W. 50 feet; thence N. 85°30′ W. 50 feet; thence S. 79°30′ W. 50 feet; thence S. 83°30′ W. 100 feet; thence N. 74°00′ W. 128 feet; thence N. 54°00′ W. 500 feet; thence N. 37°30′ W. 700 feet; thence N. 43°15′ W. 280 feet; thence N. 41°32′ W. 450 feet to the intersection of the centerline of Alta Avenue with the centerline of Oak Avenue thence S. 66°32′42″ W. 110.73 feet to the intersection of the centerline of Oak Avenue with the boundary of Ranch "A" of the Tamalpais Land & Water Company; thence running southerly along the boundary between Ranch "A" of the Tamalpais Land and Water Company and the land of the Sausalito Land & Ferry Company condemned in U.S. District Court suit N22280R; S. 40°24′ E. 1641.382 feet, thence S. 61°48′44″ E. 891.137 feet; thence leaving the boundary of Ranch "A" of the Tamalpais Land and Water Company; and running along the southerly boundary of the land of the Sausalito Land and Ferry Company condemned in U.S. District Court Suit N22280R as surveyed by Frank Aitkens Jr., Official Surveys, Book 2, Page 104, Marin County Records; N. 57°04′50″ E. 1257.06 feet; thence N. 09°21′16″ W. 113.07 feet to a 6″ x 6″ concrete right of way monument; thence along the northwesterly right of way of U.S. Highway No. 101, N. 41°47′29″ W. 257.62 feet to a 6″ x 6″ concrete right of way marker; thence North 02°56′35″ W. 344.66 feet to a 6″ x 6″ concrete right of way marker; thence N. 37°02′18″ E. 132.487 feet to the POINT OF BEGINNING, containing 15.65 acres, more or less.

Appendix B

District Court Order

In the United States District Court
For the Northern District of California

C-77-0998SW

United States of America,
Plaintiff,

vs.

15.65 Acres of Land in the County of Marin, State of California; Marin Ridgeland Company, a joint venture, etc.; James H. Scheuer, et al.,
Defendants.

[Filed Dec. 5, 1980]

This Court, having duly considered the memorandum of points and authorities submitted by the parties and the record herein, finds that defendants' Motion for Interest on Judgment must be denied.

It is the opinion of the Court that defendant is not entitled to interest from the date of entry of judgment, but rather, is only entitled to interest from the date of "taking" by the government. *Gould v. United States,* 301 F. 2d 557 (D.C. Cir. 1962); *United States v. Johns,* 146 F. 2d 92 (9th Cir. 1944). This Court finds that since there has been no declaration of taking or order of possession filed and the United States has not entered into possession of the property, there has been no taking by the government.

Defendants also request this Court to make a determination of the rate of interest, but since no taking has occurred, such a determination would be premature at this time.

Accordingly, IT IS HEREBY ORDERED that defendants' motion is denied.

DATED December 5, 1980

/s/ SPENCER WILLIAMS
United States District Judge

Appendix C

Opinion

United States Court of Appeals
For the Ninth Circuit

No. 81-4062
No. 81-4101

DC# CV-77-0998-SW
United States of America,
Plaintiff-Appellant/Cross-Appellee,

vs.

15.65 Acres of Land in the County of Marin,
State of California; Marin Ridgeland Company,
a joint venture comprised of O.D.C. of California, Inc.,
a corporation; and J. H. Scheuer, a.k.a. James H. Scheuer;
Housing Authority of the County of Marin;
Redevelopment Agency of the County of Marin;
County of Marin; and Unknown Owners,
Defendants-Appellees/Cross-Appellants.

[Filed May 25, 1982]

OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and Submitted March 9, 1982

Before: CHOY, SNEED, and SCHROEDER,
Circuit Judges

SNEED, Circuit Judge:

James H. Scheuer and Marin Ridgeland (both hereafter designated as the Company) owned a 164.03 acre tract, which they were developing for residential use. Their neighbors, Glass and Fitzsimmons, also intended to develop

their lands. A condition to the latter developments was the dedication to public use of a road, which would provide southern access to the Company's property (*see* diagram, Appendix A). Optimal development of the Company's land depended upon such access.

In 1977, the government instituted contemporaneous condemnation actions against Glass, Fitzsimmons and the Company to acquire land for the Golden Gate National Recreation Area (G.G.N.R.A.). The condemnation trial for 15.65 acres of the Company's land began on July 28, 1980. The jury awarded $623,196 in "severance damages." In determining this amount, they were permitted, over objection, to consider the effect of both loss of access and a probable change to a much more restrictive zoning classification. The government contends that neither should have been considered. The Company cross-appeals the denial of its motion for post-judgment interest. Our jurisdiction rests on 28 U.S.C. § 1291. We reverse the judgment with respect to severance damages and remand for further proceedings. We also reverse the denial of the Company's motion regarding interest.

I.

SEVERANCE DAMAGES

Unless there is a taking,[1] the government is not required to compensate a landowner even though its actions affect the value of his land. *United States v. Fuller*, 409 U.S. 488, 492 (1973); *Campbell v. United States*, 266 U.S. 368, 371 (1924). When there is a taking, the Fifth Amendment mandates payment of the value of the taken lands. Several

[1]The parties to this case do not dispute that there has been or will be a taking of some of the Company's property.

rules have been developed for determining the extent to which this value includes so-called severance damages. First, severance damages, consisting of a diminution in value of the remainder resulting from the taking and use of the part of the land, are recoverable. *United States v. Miller*, 317 U.S. 369, 376 (1943); *United States v. 91.90 Acres of Land*, 586 F.2d 79, 86 (8th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979). Second, severance damages do not include any diminution in value arising solely from "the acquisition and use of adjoining lands of others for the same undertaking." *Campbell v. United States*, 266 U.S. at 372, *see also United States v. 10.0 Acres of Land*, 533 F.2d 1092, 1097 (9th Cir. 1976) (Carter, J., dissenting); *Gibson & Perin Co. v. Cincinnati*, 480 F.2d 936, 944-45 (6th Cir.), *cert. denied*, 414 U.S. 1068 (1973).

Both rules lead to sensible results. A private seller, upon receiving a bid for a portion of his land and responding thereto in a rational manner, will fix his asking price at an amount that will compensate him for any diminution in value of the remainder of his land. The buyer must pay this price if he wishes to acquire the portion he seeks. On the other hand, a private landowner whose property has its value reduced by the acquisition and use of an adjoining neighbor's land by a third party buyer ordinarily cannot recoup this loss from either the neighbor or the third party buyer. Only the imposition of a duty by operation of law can alter this result. In the absence of such a duty, the third party buyer, having no need for any of the injured landowner's property, will pay him nothing, and the neighbor obviously will not be moved to share voluntarily the proceeds of his sale. Under these circumstances the injured landowner has no remedy. The government in condemna-

tion proceedings is subject to the burdens, as well as the benefits, of these economic realities inasmuch as its liability, as the Court in *Campbell* explained, is no broader than that of a private party. 266 U.S. at 372.

The application of these rules becomes complex when the injury to the landowner may be said to flow both from the taking and use of but a portion of his property *and* from the use to which the government puts land taken from a third party neighbor. At first blush the problem appears to be merely that of choosing which of the above two rules should apply. Reflection and case authority suggest, however, that a third rule is required. This rule appears in *United States v. Pope & Talbot,* 293 F.2d 822 (9th Cir. 1961), in which payment for reduced accessibility of land *not* taken was permitted when a dam project undertaken by the condemnor government flooded a road which traversed both the government's land and the property taken from the condemnee landowner. In that case we noted the existence of three factors that distinguished it from *Campbell,* the source of the second rule stated above: (1) the land taken from the condemnee landowner was indispensable to the dam project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the dam project. 293 F.2d at 825. Thus, three elements, indispensability, substantiality, and inseparability, are necessary to negate the application of *Campbell.*

The necessity of these elements is also quite sensible. The element of indispensability assures that the government is

being required to pay no more than a private buyer confronted with the same compulsion. In either event, indispensability affords the landowner the ability to demand payment for the injury to his remaining property, just as he is able to do so under the first rule stated above. Substantiality tends to assure the existence, in fact, of indispensability, and inseparability tends to assure that the injury to the land not taken does not arise from a use independent of the project with respect to which the property taken was indispensable.

The Company in this case did not attempt to utilize these elements in its efforts to recover for the decline in value of the land retained attributable to the loss of access and down-zoning. Nor was the jury charged in accordance with the teaching of *Pope & Talbot, Inc.* The portion of the charge applicable to severance damages, which is set forth in the margin,[2] is quite general. The operative portion provides:

> "If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass

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[2]This portion of the charge is as follows:

"You are instructed that no consideration shall be given to nor allowance of just compensation made for any elements of value depending upon events or circumstances or combination of occurrences, which, while within the realm of possibility, have not been shown by a preponderance of the evidence by the landowners to be reasonably probable in the reasonably near future after the date of valuation.

For example, the property owners assert the value of the remainder has been diminished by the taking of the Glass and Fitzsimmons properties by virtue of their belief that had such properties developed without intervention of the project, a southerly access to the subject property over the Glass and Fitzsimmons properties would have been available.

If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass and Fitzsim-

and Fitzsimmons property been developed, such access would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder."

Under this charge the compensability of the decline in value of the Company's retained 148.38 acres turns exclusively on the "reasonable probability that had the Glass and Fitzsimmons property been developed, such access would have been available."

In no way does this charge link the 15.65 acres taken from the Company with the taking and use of the Glass and Fitzsimmons property. The taking of the 15.65 acres would appear to be an adventitious event that permits, contrary to the rule of *Campbell*, compensation for a decline in value of the retained 148.38 acres resulting *solely* from the taking and use of the Glass and Fitzsimmons properties. In essence, the charge appears based on the principle that a taking and use of my neighbor's land by the government that diminishes the value of my land entitles me, without any further showing, to compensation under the Fifth Amendment. This is not the law.

The required linkage between the Company's 15.65 acres taken by the government and the taking and use of the Glass and Fitzsimmons property consists of the three

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mons property been developed, such access would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder." R.T. 1267

elements of *Pope & Talbot, Inc.* previously discussed. The jury charge must incorporate not only the reasonable probability that but for the taking of the Glass and Fitzsimmons properties the southern access would have existed, but also the indispensability of the Company's 15.65 acres to government program of acquisition for the G.G.N.R.A., which included the acquisition of the Glass and Fitzsimmons properties, the consequentiality of the Company's tract to this program, and the necessity that the decline in value of the retained 148.38 acres be attributable *both* to the taking and use of the 15.65 acres of Company land and the taking and use of the Glass and Fitzsimmons properties.

Notwithstanding the necessity of establishing the *Pope & Talbot, Inc.* linkage when compensation is sought for a decline in value attributable in part to the taking of a neighbor's property, the Company in this case is entitled to compensation for such decline in value in its retained 148.38 acres if it is able to show by a preponderance of the evidence that this decline is *solely* attributable to the taking and use of its 15.65 acres. Obviously any decline attributable to the taking and use of the Glass and Fitzsimmons tracts would not be compensable under this approach. The loss of southern access would not appear to be compensable under this approach;[3] but the state of the record precludes

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[3]This assumes that it is impossible to determine or separate loss access due to the taking of the 15.65 acres and from that resulting from the taking of Glass and Fitzsimmons lands. If damages are separable, the two general rules can be directly applied to each kind of damages. *See* Georgia-Pacific Corp. v. United States, 640 F.2d 328 (Ct. Cl. 1980).

a ready answer with regard to down-zoning.[4] Perhaps the Company can demonstrate that the probability of down-zoning was solely attributable to the taking and use of the 15.65 acres. In any event, on remand it is entitled to try.

For the reasons set forth above we must reverse the judgment below insofar as it awards severance damages in the amount of $623,196, and remand for further proceedings that are in accord with this portion of our opinion.

II.

THE CROSS-APPEAL: POST JUDGMENT INTEREST

The Company cross-appeals the denial of its motion for post judgment interest.

Although interest is usually not available on a judgment against the United States absent a statute, *DeLucca v. United States*, No. 81-5011 (9th Cir. Mar. 1, 1982), the Fifth Amendment makes interest available when a taking precedes payment. *United States v. 174.12 Acres of Land*, No. 80-3433 (9th Cir. Feb. 8, 1982); *United States v. Johns*, 146 F.2d 92, 93 (9th Cir. 1944). However, condemnees are not entitled to interest before the date of the taking. *Danforth v. United States*, 308 U.S. 271, 286, (1939); *United States v. 156.81 Acres of Land*, No. 79-4547 (9th Cir. Mar.

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[4]There were some indications in the record that it was the special view from the ridge which county officials were seeking to protect.

The government contends on appeal that a zoning change cannot be a proper factor to consider when calculating severance damages. We disagree. A probable zoning change would be considered by a private buyer in determining fair market value of the property, and therefore may be considered in a condemnation proceeding. United States v. 174.12 Acres of Land, No. 80-3433 (9th Cir. Feb. 8, 1982); United States v. 320.0 Acres of Land, 605 F.2d 762, 819 (5th Cir. 1979).

12, 1982). The issue before us, therefore, is when, if ever, did a taking occur?

The trial court held that the government had not yet taken the land because it had neither filed a declaration of taking nor entered into possession. However, there is no simple formula for establishing when property has been taken. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Rather, deciding when a taking occurs requires an ad hoc inquiry into when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

The effect of a condemnation suit on unimproved land held for development is significantly different from its effect on developed property. While a condemnation suit may change the value of improved property somewhat, the owner usually continues to enjoy the beneficial use of his land until a declaration of taking is filed. *See Gould v. United States*, 301 F.2d 557, 559 (D.C. Cir. 1962) (no interest where owner received income and retained title and possession). Intervening fluctuations in value are indistinguishable from the usual burdens of ownership and do not constitute a taking. *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1980); *Danforth*, 308 U.S. at 285. Therefore, when the government condemns improved or productive property, neither the stipulated date of valuation, *United States v. Mahowald*, 209 F.2d 751, 754 (8th Cir. 1954), nor the date of judgment, *Danforth*, 308 U.S. at 284; *Gould*, 301 F.2d at 560, mark the date of a taking.

On the other hand, when the property condemned is intended for development and sale, and remains unimproved,

the owner following a condemnation suit frequently loses more than just value; he may be deprived of all economic use of his land. While the action is pending, the land is almost impossible to sell, although that alone is not sufficient to create a taking. *Agins v. Tiburon*, 447 U.S. 255, 263 n. 9 (1980). Also, as was pointed out by the majority in *United States v. 156.81 Acres*, No. 79-4547 (9th Cir. Mar. 12, 1982), no one would improve the property after the date of valuation because the government could acquire it at a pre-improvement price. *Accord State v. Nordstrom*, 54 N.J. 50, 253 A.2d 163, 166 (1969); *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1247 (Alaska 1974). The owner of unimproved land is thus left with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking.

Under these circumstances, we hold it proper to invoke the rule that when the government deprives an owner of all economic use of his land, there has been a taking. *156.81 Acres, supra; see also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978). In this case a virtual ban on development and sale has been imposed that has rendered impossible any economic use of the 15.65 acres. We therefore hold that the land has been taken.

The next question is when did it occur? Under the somewhat unusual circumstances of this case, we find the stipulated date of valuation to be the date. *156.81 Acres, supra*, in which the date of judgment was held to be the date of the taking, does not compel a different result. In that case, valuation was just one month before trial. The landowners were therefore not burdened for long with the development limitations which, together with the sale re-

striction, rendered the land useless. In contrast, the parties here valued the land as of a date more than one year before the start of the trial and were without use or compensation for a long period of time. Applying a sense of "justice and fairness," *Penn Central Transportation*, 438 at 124, we hold that the landowners are entitled to interest from May 5, 1979, the date of valuation.

Nor are we barred from reaching this result by the Company's request for interest only from the date of judgment, December 8, 1980. It would be unfair to adhere to that date in view of our reversal of that portion of the judgment pertaining to severance damages. To postpone the date of taking to a time subsequent to the date our mandate becomes effective would be even more unfair. The date we have selected, May 5, 1979, we believe is a just and fair one.

The appropriate rate of interest is an issue of fact. *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464 (9th Cir. 1980); *United States v. Blankinship*, 543 F.2d 1272 (9th Cir. 1976). We therefore remand the case to the district court for a determination of the proper interest rate.

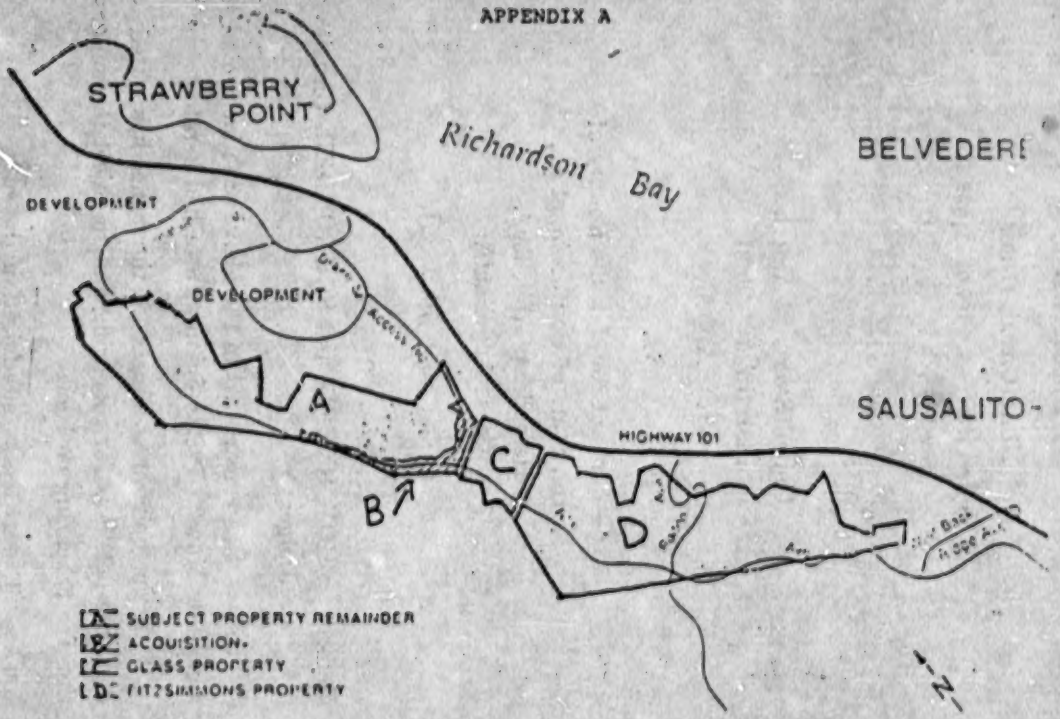
III.

CONCLUSION

We reverse and remand this case to the trial court for a determination of the proper amount of severance damages, if any, and the proper rate of interest. In all other respects the judgment, as modified by this opinion, is affirmed.

REVERSED AND REMANDED IN PART; AFFIRMED AND MODIFIED IN PART.

APPENDIX A



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Appendix D

Ninth Circuit Order

United States Court of Appeals
for the Ninth Circuit

No. 81-4062
No. 81-4101

United States of America,
Plaintiff-Appellant/
Cross-Appellee,

vs.

15.65 Acres of Land in the County of
Marin, State of California, et al.,
Defendants-Appellee/
Cross-Appellants.

[Filed Sept. 10, 1982]

ORDER

Before: CHOY, SNEED, and SCHROEDER, Circuit Judges

The panel as constituted in the above case has voted to amend its May 25, 1982 opinion as attached hereto.

With the opinion so amended, the panel has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestion for rehearing en banc is rejected.

Appendix E

Amended Opinion
United States Court of Appeals
for the Ninth Circuit

No. 81-4062
No. 81-4101

DC# CV-77-0998-SW
United States of America,
Plaintiff-Appellant/
Cross-Appellee,

vs.

15.65 Acres of Land in the County of Marin, State of California; Marin Ridgeland Company; a joint venture comprised of O.D.C. of California, Inc., a corporation; and J. H. Scheuer, a.k.a. James H. Scheuer; Housing Authority of the County of Marin; Redevelopment Agency of the County of Marin; County of Marin; and Unknown Owners,
Defendants-Appellees/
Cross-Appellants.

[Filed May 26, 1982]

AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and Submitted March 9, 1982

Before: CHOY, SNEED, and SCHROEDER, Circuit Judges

SNEED, Circuit Judge:

James H. Scheuer and Marin Ridgeland (both hereafter designated as the Company) owned a 164.03 acre tract,

which they were developing for residential use. Their neighbors, Glass and Fitzsimmons, also intended to develop their lands. A condition to the latter developments was the dedication to public use of a road, which would provide southern access to the Company's property (*see* diagram, Appendix A). Optimal development of the Company's land depended upon such access.

In 1977, the government instituted contemporaneous condemnation actions against Glass, Fitzsimmons and the Company to acquire land for the Golden Gate National Recreation Area (G.G.N.R.A.). The condemnation trial for 15.65 acres of the Company's land began on July 28, 1980. The jury awarded $623,196 in "severance damages." In determining this amount, they were permitted, over objection, to consider the effect of both loss of access and a probable change to a much more restrictive zoning classification. The government contends that neither should have been considered. The Company cross-appeals the denial of its motion for post-judgment interest. Our jurisdiction rests on 28 U.S.C. § 1291. We reverse the judgment with respect to severance damages and remand for further proceedings. We also reverse the denial of the Company's motion regarding interest.

I.

SEVERANCE DAMAGES

Unless there is a taking,[1] the government is not required to compensate a landowner even though its actions affect the value of his land. *United States v. Fuller*, 409 U.S. 488, 492 (1973); *Campbell v. United States*, 266 U.S. 368, 371

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[1]The parties to this case do not dispute that there has been or will be a taking of some of the Company's property.

(1924). When there is a taking, the Fifth Amendment mandates payment of the value of the taken lands. Several rules have been developed for determining the extent to which this value includes so-called severance damages. First, severance damages, consisting of a diminution in value of the remainder resulting from the taking and use of the part of the land, are recoverable. *United States v. Miller*, 317 U.S. 369, 376 (1943); *United States v. 91.90 Acres of Land*, 586 F.2d 79, 8[illegible] (8th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979). Second, severance damages do not include any diminution in value arising solely from "the acquisition and use of adjoining lands of others for the same undertaking." *Campbell v. United States*, 266 U.S. at 372, *see also United States v. 10.0 Acres of Land*, 533 F.2d 1092, 1097 (9th Cir. 1976) (Carter, J., dissenting); *Gibson & Perin Co. v. Cincinnati*, 480 F.2d 936, 944-45 (6th Cir.), *cert. denied*, 414 U.S. 1068 (1973).

Both rules lead to sensible results. A private seller, upon receiving a bid for a portion of his land and responding thereto in a rational manner, will fix his asking price at an amount that will compensate him for any diminution in value of the remainder of his land. The buyer must pay this price if he wishes to acquire the portion he seeks. On the other hand, a private landowner whose property has its value reduced by the acquisition and use of an adjoining neighbor's land by a third party buyer ordinarily cannot recoup this loss from either the neighbor or the third party buyer. Only the imposition of a duty by operation of law can alter this result. In the absence of such a duty, the third party buyer, having no need for any of the injured landowner's property, will pay him nothing, and the neighbor obviously will not be moved to share voluntarily the

proceeds of his sale. Under these circumstances the injured landowner has no remedy. The government in condemnation proceedings is subject to the burdens, as well as the benefits, of these economic realities inasmuch as its liability, as the Court in *Campbell* explained, is no broader than that of a private party. 266 U.S. at 372.

The application of these rules becomes complex when the injury to the landowner may be said to flow both from the taking and use of but a portion of his property *and* from the use to which the government puts land taken from a third party neighbor. At first blush the problem appears to be merely that of choosing which of the above two rules should apply. Reflection and case authority suggest, however, that a third rule is required. This rule appears in *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961), in which payment for reduced accessibility of land *not* taken was permitted when a dam project undertaken by the condemnor government flooded a road which traversed both the government's land and the property taken from the condemnee landowner. In that case we noted the existence of three factors that distinguished it from *Campbell*, the source of the second rule stated above: (1) the land taken from the condemnee landowner was indispensible to the dam project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the dam project. 293 F.2d at 825. Thus, three elements, indispensability, substantiality, and inseparability, are necessary to negate the application of *Campbell*.

The necessity of these elements is also quite sensible. The element of indispensability assures that the government is being required to pay no more than a private buyer confronted with the same compulsion. In either event, indispensability affords the landowner the ability to demand payment for the injury to his remaining property, just as he is able to do so under the first rule stated above. Substantiality tends to assure the existence, in fact, of indispensability, and inseparability tends to assure that the injury to the land not taken does not arise from a use independent of the project with respect to which the property taken was indispensable.

The Company in this case did not attempt to utilize these elements in its efforts to recover for the decline in value of the land retained attributable to the loss of access and down-zoning. Nor can we conclude from the record that the district judge considered these elements.[2] The jury charge itself lends support to this conclusion.[3] It may be that these elements nonetheless can be established on remand.

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[2]These elements are properly within the district judge's province to consider. It is for the district judge "to decide 'all issues' other than the precise issue of the amount of compensation to be awarded." United States v. Roberts, 397 U.S. 14, 20 (1970).

[3]The relevant portion provides:

> "If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass and Fitzsimmons property been developed, such access would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder."

In essence, the charge appears based on the principle that a taking and use of my neighbor's land by the government that diminishes the value of my land entitles me, without any further

Notwithstanding the necessity of establishing the *Pope & Talbot, Inc.* linkage when compensation is sought for a decline in value attributable in part to the taking of a neighbor's property, the Company in this case would be entitled to compensation for such decline in value in its retained 148.38 acres if it were able to show by a preponderance of the evidence that this decline is *solely* attributable to the taking and use of its 15.65 acres. Obviously any decline attributable to the taking and use of the Glass and Fitzsimmons tracts would not be compensable under this approach. The loss of southern access would not appear to be compensable under this approach;[4] but the state of the record precludes a ready answer with regard to down-zoning.[5] Perhaps the Company can demonstrate that

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showing, to compensation under the Fifth Amendment. This is not the law. The required linkage between the Company's 15.65 acres taken by the government and the taking and use of the Glass and Fitzsimmons property consists of the three elements of *Pope & Talbot, Inc.* previously discussed.

[4]This assumes that it is impossible to determine or separate loss access due to the taking of the 15.65 acres and from that resulting from the taking of Glass and Fitzsimmons lands. If damages are separable, the two general rules can be directly applied to each kind of damages. *See* Georgia-Pacific Corp. v. United States, 640 F.2d 328 (Ct. Cl. 1980).

[5]There were some indications in the record that it was the special view from the ridge which county officials were seeking to protect.

The government contends on appeal that a zoning change cannot be a proper factor to consider when calculating severance damages. We disagree. A probable zoning change would be considered by a private buyer in determining fair market value of the property, and therefore may be considered in a condemnation proceeding. United States v. 174.12 Acres of Land, 671 F.2d 313 (9th Cir. 1982); United States v. 320.0 Acres of Land, 605 F.2d 762, 819 (5th Cir. 1979).

the probability of down-zoning was solely attributable to the taking and use of the 15.65 acres. In any event, on remand it is entitled to try.

For the reasons set forth above we must reverse the judgment below insofar as it awards severance damages in the amount of $623,196, and remand for further proceedings that are in accord with this portion of our opinion.

II.

THE CROSS-APPEAL: POST JUDGMENT INTEREST

The Company cross-appeals the denial of its motion for post judgment interest.

Although interest is usually not available on a judgment against the United States absent a statute, *DeLucca v. United States,* No. 81-5011 (9th Cir. Mar. 1, 1982), the Fifth Amendment makes interest available when a taking precedes payment. *United States v. 174.12 Acres of Land,* No. 80-3433 (9th Cir. Feb. 8, 1982); *United States v. Johns,* 146 F.2d 92, 93 (9th Cir. 1944). However, condemnees are not entitled to interest before the date of the taking. *Danforth v. United States,* 308 U.S. 271, 286 (1939); *United States v. 156.81 Acres of Land,* No. 79-4547 (9th Cir. Mar. 12, 1982). The issue before us, therefore, is when, if ever, did a taking occur?

The trial court held that the government had not yet taken the land because it had neither filed a declaration of taking nor entered into possession. However, there is no simple formula for establishing when property has been taken. *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). Rather, deciding when a taking occurs requires an ad hoc inquiry into when " 'justice and fairness' require that economic injuries caused by public action be compen-

sated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

The effect of a condemnation suit on unimproved land held for development is significantly different from its effect on developed property. While a condemnation suit may change the value of improved property somewhat, the owner usually continues to enjoy the beneficial use of his land until a declaration of taking is filed. *See Gould v. United States*, 301 F.2d 557, 559 (D.C. Cir. 1962) (no interest where owner received income and retained title and possession). Intervening fluctuations in value are indistinguishable from the usual burdens of ownership and do not constitute a taking. *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1980); *Danforth*, 308 U.S. at 285. Therefore, when the government condemns improved or productive property, neither the stipulated date of valuation, *United States v. Mahowald*, 209 F.2d 751, 754 (8th Cir. 1954), nor the date of judgment, *Danforth*, 308 U.S. at 284; *Gould*, 301 F.2d at 560, mark the date of a taking.

On the other hand, when the property condemned is intended for development and sale, and remains unimproved, the owner following a condemnation suit frequently loses more than just value; he may be deprived of all economic use of his land. While the action is pending, the land is almost impossible to sell, although that alone is not sufficient to create a taking. *Agins v. Tiburon*, 447 U.S. 255, 263 n.9 (1980). Also, as was pointed out by the majority in *United States v. 156.81 Acres*, No. 79-4547 (9th Cir. Mar. 12, 1982), no one would improve the property after the date of valuation because the government could acquire it

at a pre-improvement price. *Accord State v. Nordstrom*, 54 N.J. 50, 253 A.2d 163, 166 (1969); *Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1247 (Alaska 1974). The owner of unimproved land is thus left with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking.

Under these circumstances, we hold it proper to invoke the rule that when the government deprives an owner of all economic use of his land, there has been a taking. *156.81 Acres, supra; see also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978). In this case a virtual ban on development and sale has been imposed that has rendered impossible any economic use of the 15.65 acres. We therefore hold that the land has been taken.

The next question is when did it occur? Under the somewhat unusual circumstances of this case, we find the stipulated date of valuation to be the date. *156.81 Acres, supra*, in which the date of judgment was held to be the date of the taking, does not compel a different result. In that case, valuation was just one month before trial. The landowners were therefore not burdened for long with the development limitations which, together with the sale restriction, rendered the land useless. In contrast, the parties here valued the land as of a date more than one year before the start of the trial and were without use or compensation for a long period of time. Applying a sense of "justice and fairness," *Penn Central Transportation*, 438 U.S. at 124, we hold that the landowners are entitled to interest from March 5, 1979, the date of valuation.

Nor are we barred from reaching this result by the Company's request for interest only from the date of judgment,

December 8, 1980. It would be unfair to adhere to that date in view of our reversal of that portion of the judgment pertaining to severance damages. To postpone the date of taking to a time subsequent to the date our mandate becomes effective would be even more unfair. The date we have selected, March 5, 1979, we believe is a just and fair one.

The appropriate rate of interest is an issue of fact. *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464 (9th Cir. 1980); *United States v. Blankinship*, 543 F.2d 1272 (9th Cir. 1976). We therefore remand the case to the district court for a determination of the proper interest rate.

III.

CONCLUSION

We reverse and remand this case to the trial court for a determination of the proper amount of severance damages, if any, and the proper rate of interest. In all other respects the judgment, as modified by this opinion, is affirmed.

REVERSED AND REMANDED IN PART; AFFIRMED AND MODIFIED IN PART.

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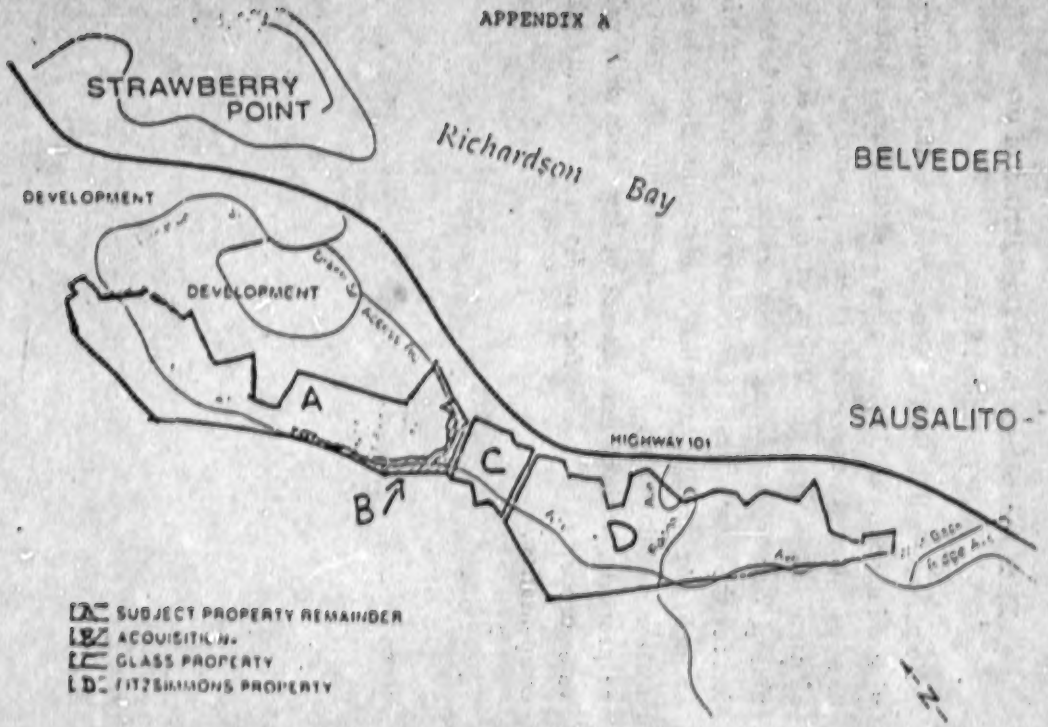
APPENDIX A



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APPENDIX G

Statutes and Rules

16 U.S.C. § 460bb.

In order to preserve for public use and enjoyment certain areas of Marin and San Francisco Counties, California, possessing outstanding natural, historic, scenic, and recreational values, and in order to provide for the maintenance of needed recreational open space necessary to urban environment and planning, the Golden Gate National Recreation Area (hereinafter referred to as the "recreation area") is hereby established. In the management of the recreation area, the Secretary of the Interior (hereinafter referred to as the "Secretary") shall utilize the resources in a manner which will provide for recreation and educational opportunities consistent with sound principles of land use planning and management. In carrying out the provisions of sections 460bb to 460bb-5 of this title, the Secretary shall preserve the recreation area, as far as possible, in its natural setting, and protect it from development and uses which would destroy the scenic beauty and natural character of the area.

16 U.S.C. § 460*l*-4.

The purposes of sections 460*l*-4 to 460*l*-11 of this title are to assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations and visitors who are lawfully present within the boundaries of the United States of America such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation

and to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas.

40 U.S.C. § 257.

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

Rule 71A Federal Rules of Civil Procedure (Excerpt)

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

* * * *

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of

just compensation shall be the tribunal for the determination of that issue; but if there is no specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

* * * *